Supreme Court, U.S.
FILED

(1)

No. 97-18 JUN 30 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY MONICA DAVID,

Petitioner,

v.

CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City of Denver; ARISTEDES ZAVARAS, chief of Police, City and County of Denver; MANUEL MARTINEZ, Manager of Safety, City and County of Denver; STANLEY BANIESZEWSKI; JOHN R. JOHNSON; WILLIAM HONER; JAMES LEO; AND CLAYTON KELLY CARPENTER,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

BARRY D. ROSEMAN
899 Logan Street, Suite 203
Denver, Colorado 80203
303/839-1771

Attorney for Petitioner

June 30, 1997

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

69 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Whether a police officer's speech about allegations of sexual harassment and retaliation she claims to have been committed against her involves a matter of public concern.

2. Whether the Court of Appeals erred in deciding that a recusal motion under 28 U.S.C. §455(a) should be decided on the basis of the judge's alleged impartiality, not on whether a reasonable person would harbor doubts about the judge's impartiality.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Statement of the Facts 3

Proceedings Below 5

REASONS FOR GRANTING THE PETITION 7

I. The Circuits Are Split on Whether Public Employees' Protest of Sexual Harassment by Fellow Employees Constitutes a Matter of Public Concern. 7

II. The Tenth Circuit's Decision in this Case Is in Conflict with the Standards Established by this Court in *Connick v. Myers*. 13

III. The Tenth Circuit's Failure to Use an Objective Standard on the Issue of Recusal Is in Fundamental Conflict with the Statute and with Prior Precedent 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Auriemma v. Rice, 910 F.2d 1449, 1459-61 (7th Cir. 1990) (en banc) 11, 12, 14

Azzaro v. County of Allegheny, 110 F. 3d 968 (3d Cir. 1997) (en banc) 10, 13

Beardsley v. Webb, 30 F.3d 524 (4th Cir 1994) 11

Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988) 12

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 12

Connick v. Myers, 461 U.S. 138 (1983) . 6-7, 8, 10, 13-14

David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996) 1, 6-7, 9, 10, 15

Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979) 14

Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 F.2d 1029 (1990) 10, 12

Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994) . . . 16

Hartman v. Bd. of Trustees of Community College Dist. 508, 4 F.3d 465 (7th Cir.1993) 12

Hinman v. Rogers, 831 F.2d 937 (10th Cir. 1987) 16

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 15

Litesky v. United States, 114 S.Ct. 1147 (1994) 15

Matulin v. Village of Lodi, 862 F.2d 609 (6th Cir.1988) 11

Table of Authorities continued

Page

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 2708 (1994) 10

Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995) 16

Rice v. Ohio, Dept. of Transp., 887 F.2d 716 (6th Cir. 1989) 11

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) . . 11

Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) . . . 10

United States v. Cooley, 1 F.3d 985 (10th Cir. 1993) . . 16

United States v. Greenspan, 26 F.3d 1001 (10th Cir. 1994) 16

Watkins v. Bowden, 105 F.3d 1344 (11th Cir. 1977) . . . 10

Watters v. City of Philadelphia, 55 F.3d 886 (3d Cir. 1995) 11

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992) 14

Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992) 9

Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) 9

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) . 9

Yatvin v. Madison Metro. School Dist., 840 F.2d 412 (7th Cir. 1988) 12

Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988) 11

Table of Authorities continued

Page

Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994) 12

U.S. CONSTITUTION:

U.S. Const., First Amendment 6, 11, 12, 13

STATUTES:

28 U.S.C. §455(a) 2, 6, 15

28 U.S.C. §1254(1) 2

42 U.S.C. §1983 . . . . . 2, 6

MISCELLANEOUS:

Smith, *Beyond "Public Concern". New Free Speech Standards for Public Employees*, 57 U. Chicago L.Rev. 249 (1990) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY MONICA DAVID,

Petitioner,

v.

CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City of Denver; ARISTEDES ZAVARAS, chief of Police, City and County of Denver; MANUEL MARTINEZ, Manager of Safety, City and County of Denver; STANLEY BANIESZEWSKI; JOHN R. JOHNSON; WILLIAM HONER; JAMES LEO; AND CLAYTON KELLY CARPENTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Dorothy Monica David hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Apndx. 1a-30a) is reported at 101 F.3d 1344. The order of the court of appeals, denying petitioner's petition for rehearing and suggestion for rehearing en banc (Apndx. 44a-45a), is not reported. The order of the district court, granting respondents' motion for summary judgment based on qualified immunity (Apndx. 37a-43a), is not reported. The order of the district court denying

the petitioner's motion for qualification of trial judge (Apndx. 31a-36a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1996. A petition for rehearing and suggestion for rehearing en banc was denied on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any Rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Statement of the Facts

This case arose out allegations by the Petitioner, a police officer employed by Respondent City and County of Denver, that a fellow police officer, Respondent Baniszewski, had made uninvited sexual advances to her while they were both working in a part-time job for the Golden West Management Company (hereinafter, "Golden West") in 1987 (10th Cir. Apndx. 390-91).[1] Officer David, who had refused the sexual advances, reported Respondent Baniszewski's conduct to her supervisor, Sergeant David Watt, in June of 1987 and asked to be relieved from any contact with Officer Baniszewski (10th Cir. Apndx. 391).

Officer David's immediate supervisors did little or nothing to solve these problems, other than to order them to work out their personal problems and to suggest to Officer David that she change her shift -- one which she preferred -- so that she would not be working the same hours as Officer Baniszewski (10th Cir. Apndx. 391-92). Respondent Baniszewski and a fellow Denver police officer, Respondent Johnson, who also worked on a part-time basis for Golden West, induced that company to terminate Officer David's part-time employment with that company after she had complained about Officer Baniszewski's sexual advances and his other conduct which she had found to be harassing and retaliatory (*Id.*).

Officer David and Respondents Baniszewski and Johnson were able to obtain their part-time employment with Golden West only because they were police officers with the Denver

---

[1] References to the appendix Petitioner filed in the Tenth Circuit will be in the form "10th Cir. Apndx. __."

Police Department (10th Cir. Apndx. 36). Their employment as police officers enabled them to carry weapons as part of that part-time employment and to exercise their police powers and police authority in that employment (*Id.*). Officer David and these other officers had to obtain Denver Police Department approval for their part-time employment with Golden West (*Id.*). Respondents Baniszewski and Johnson used the authority with which they clothed by the Denver Police Department to retaliate against Officer David. While wearing their official police uniforms, they (inaccurately) informed managerial employees at Officer David's part-time employment that she was under investigation by the Denver Police Department (10th Cir. Apndx. 36-37).

On April 19, 1989, Officer David filed a complaint with the Internal Investigation and Inspection Bureau of the Denver Police Department, in which she alleged sexual harassment by Respondent Baniszewski and retaliation by him, Respondent Johnson, and by Sergeant William Honer (10th Cir. Apndx. 392). Officer David alleged that Sergeant Honer had taken Officer Baniszewski's side and that he had threatened and harassed her. Officer David accused Sergeant Honer of harassing her, threatening her with retaliation, transferring her to a different assignment or to a different district, and generally making her life miserable (10th Cir. Apndx. 391-92).

On May 3, 1989, Officer David filed a charge with the Equal Employment Opportunity Commission (hereinafter, "EEOC"), in which she alleged that a coworker had sexually harassed her, that she had complained about that harassment to her supervisors and that "[n]o corrective action has been taken to stop the harassment nor has any disciplinary action been taken against the harasser" (10th Cir. Apndx. 138). On June 30, 1989, she sent a written notice to the Denver City

Attorney (10th Cir. Apndx. 353-56), notifying him of her federal constitutional and statutory claims against the Respondents. She filed a second EEOC complaint in July 1989, alleging that the sexual harassment and retaliation had continued.

On August 29, 1989, Respondent Martinez imposed unpaid suspensions of twenty days and six months, respectively, on Petitioner for two separate incidents of alleged tardiness (10th Cir. Apndx. 396, 400). The first of those incidents had occurred on April 28, 1989, when Petitioner arrived in the roll-call room at the time the duty sergeant began roll call (10th Cir. Apndx. 395). The second incident involved Petitioner's reporting for duty on May 16, 1989 ten minutes before her normal reporting time, but fifty minutes after the time to which her roll call had been rescheduled for that one day (10th Cir. Apndx. 397).

The Denver Police Department Operations Manual provided then that the minimal penalty assessment for the second unexcused incident of tardiness in six months would be an oral reprimand with an entry made in the officer's employment records (10th Cir. Apndx. 344). Based on that language, Respondent Carpenter had recommended that Petitioner receive only a reprimand for the second of these two incidents (10th Cir. Apndx. 397-98). Respondent Zavaras, then chief of the Denver Police Department, instead recommended on August 23, 1989 that Petitioner be suspended without pay for six months for that incident (10th Cir. Apndx. 400), a recommendation with which Respondent Martinez concurred (*Id.*).

Proceedings Below

The district court granted a motion for summary judgment filed by Respondents Honer, Leo and Carpenter.

That court decided that Officer David's complaints did not involve a matter of public concern (Apndx. 42a-43a). It also concluded that "the fact that [her] complaints to her supervisors concerned an area which has received substantial media attention (sexual discrimination and sexual harassment) does not vault her complaints into the arena of public concern" (*Id.*).

At a statutes conference held on November 12, 1993, the trial judge informed the attorneys that he was a "pretty close friend" of David L. Michaud, currently the chief of the Denver Police Department, and a person whom the defendants intended to call as one of their witnesses at trial (10th Cir. Apndx. 242). The trial judge also stated that Sergeant Gordon, another defense witness, was one of the investigating officers in the case involving his son's homicide, and that Chief Michaud was involved in that investigation and/or criminal case as well (10th Cir. Apndx. 242-43). He stated that he knew one of the defendants, Mr. Martinez, and that he knew of another defense witness, Captain Tina Rowe (10th Cir. Apndx. 243).

Officer David moved to disqualify the trial judge pursuant to 28 U.S.C. §455(a). In an Order dated November 24, 1993 (Apndx. 31a-36a), the trial judge refused to recuse himself.

The Tenth Circuit affirmed on the public-concern issue. *David*, 101 F.3d at 1355-57. That decision -- discussed in more detail *infra* -- was grounded on that court's conclusion that Officer David had "spoke[n] primarily in her role as an employee rather than as a citizen" in making her complaints. *Id.* at 1356. In addition, it held that, although the district court had dismissed Officer David's §1983 claim against Respondent City prematurely, "subsequent proceedings in the case authorized the court to enter summary judgment in favor of the City on the First Amendment claim." *Id.* at 1359.

That court also affirmed on the issue of recusal *Davia*, 101 F. 3d at 1350-51. It based its decision on its conclusion that the district judge's prior representation of Chief Michaud did not automatically require disqualification, that there was "no indication in the record" that that judge's prior contacts with several defense witnesses had "affected his management of the case or his factual findings and legal conclusions," and that there was no "evidence of partiality in the judge's questioning of witnesses." *Id.* at 1351.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split on Whether Public Employees' Protest of Sexual Harassment by Fellow Employees Constitutes a Matter of Public Concern.

In *Connick v. Myers*, 461 U.S. 138, 146 (1983), this Court decided that the First Amendment protects statements made by a public employee only when those statements involve "matters of public concern." Specifically, this Court held that, "when a public employee speaks not as a citizen on matters of public concern, but instead as an employee upon matters only of personal interest," the federal courts would not intervene on constitutional grounds to determine whether the employer had retaliated against that employee for those statements. *Id.* at 147.

Justice White's majority opinion did not define the term "public concern," other than to refer generally to "employee expression . . . relating to any matter of political, social, or other concern to the community." *Id.* That opinion concluded that most of the questions in Ms. Myers' questionnaire did not involve matters of public concern, since she "did not seek to inform the public that the District Attorney's Office was not discharging its governmental

responsibilities in the investigation and prosecution of criminal cases," nor did she "seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [Mr.] Connick or others." *Id.* at 148. The only question that this Court found to "touch on a matter of public concern" was one dealing with political pressure on employees "to work in political campaigns on behalf of office supported candidates." *Id.* at 149.

This Court attempted in *Connick* to establish general principles for the lower courts to follow in deciding whether public employee speech involves matters of public concern or matters of only personal interest. The standard it adopted in that case was that this issue "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Ms. Myers' "dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre" was not a matter of public concern, *Id.* at 148. In contrast, it noted that a public employee's "right to protest racial discrimination" involves "a matter inherently of public concern." *Id.* at 148 n. 8.

The lower courts have adopted very different approaches in deciding whether particular public employees' speech involve matters of public concern. As one commentator has noted, some courts condition their protection of public employee speech on whether that speech will help the public evaluate the performance of government agencies and officials; some focus on the speaker's intent; some inquire into whether public debate occurred on the matter; and others use "a laundry list of relevant factors." Smith, *Beyond "Public Concern". New Free Speech Standards for Public Employees*, 57 U. Chicago L. Rev. 249, 259-60 (1990). These different tests produce markedly different and conflicting results under very similar factual circumstances.

The Tenth Circuit's opinion in this case focused, in the final analysis, only on Officer David's alleged motive in protesting and attempting to end the sexual harassment and retaliation she was receiving from fellow police officers. The court first surveyed its prior decisions in this area, including *Woodward v. City of Worland*, 977 F.2d 1392, 1404 (10th Cir. 1992), which had concluded that the plaintiffs' complaints of sexual harassment were intended "to address personal grievances that they had" with the sexual harasser. *David*, 101 F.3d at 1355-56. However, the *Woodward* court decided that this was not necessarily the end of the analysis, since *Connick* had "held that even speech that focuses on internal employment conditions and is made in the context of a personal dispute may be regarded as a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting."[2]

The Tenth Circuit concluded that, although it had held previously that allegations of sexual harassment involved matters of public concern, [3] Officer David's allegations did not. It decided that, since her allegations allegedly had focused "on the conditions of her own employment" and since she allegedly had not claimed "that other employees have been subject to harassment or retaliation or that the harassment or

---

[2] The *Woodward* decision did not conclude whether the plaintiffs' speech was on a matter of public concern, since it held that, at the time of the speech in question, it had not been clearly established that speech similar to that made by the plaintiffs pertained to a matter of public concern. 977 F.2d at 1404.

[3] *Wulf v. City of Wichita*, 883 F.2d 842, 857-58 (10th Cir. 1989); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). The Tenth Circuit distinguished these cases on the ground that the public employees' complaints of sexual harassment in those cases involved persons other than the speakers. *David*, 101 F.3d at 1357.

retaliation has interfered with the [Police] Department's performance of its governmental responsibilities," it followed that "Officer David spoke primarily in her role as an employee rather than as a citizen." *Id.* at 1356. The "fundamental inquiry," according to that decision, "is whether the plaintiff speaks as an employee or as a citizen." *Id.*. at 1355.

The approach followed by the Tenth Circuit in this case is generally in accord with the approach followed both by the Second and Eleventh Circuits. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 143-44 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994); *Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 2708 (1994).[4]

The Seventh Circuit's decision in *Gray v. Lacke*, 885 F.2d 399, 412-14 (7th Cir. 1989), *cert. denied*, 494 F.2d 1029 (1990), cited by the Tenth Circuit in this case,[5] itself is in conflict with other decisions of that circuit.

The Third Circuit, sitting en banc, has explicitly rejected the approach used by the Tenth Circuit in this case. *Azzaro v. County of Allegheny*, 110 F.3d 968, 979-80 (3d Cir. 1997). That court concluded that using the speaker's motive as the determinative factor -- the same as focusing on the "distinction between speaking as a citizen and speaking as an employee" -- is "inconsistent with the result in *Connick*." *Id.* at 979. That court held that a complaint of sexual harassment, allegedly

---

[4] *See also Watkins v. Bowden*, 105 F.3d 1344,1353-54 (11th Cir. 1997) (complaints about highly offensive racial and sexual comments by fellow assistant solicitors in the Office of the Solicitor of DeKalb County did not involve a matter of public concern).

[5] *See David*, 101 F.3d at 1356 n. 2.

committed by an assistant to the Commissioner in the County Commissioner's office, was a matter of public concern.[6]

The Sixth Circuit also has held that statements made in a newspaper article, quoting a public employee about discrimination complaints she had filed, were on a matter of public concern protected by the First Amendment. *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988). However, in a later decision, that court distinguished *Matulin* on the ground that the record did not "reveal the existence of a public controversy concerning allegations of reverse discrimination" in the public agency in question. *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716, 721 (6th Cir. 1989).[7] The Fourth Circuit similarly has held that a female lieutenant's complaint to a county sheriff about sexual harassment by her supervisor was protected by the First Amendment. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

In *Auriemma v. Rice*, 910 F.2d 1449, 1459-61 (7th Cir. 1990) (en banc), the Seventh Circuit held that a race-

---

[6] The *Azzaro* decision is consistent with earlier decisions of that same circuit. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1201-02 (3d Cir. 1988) (telephone interview with reporter concerning alleged retaliation arising out of racial animus was a matter of public concern); *Zamboni v. Stamler*, 847 F.2d 73, 77-78 (3d Cir. 1988) (public employees' opposition to a departmental reorganization plan was a matter of public concern); *Watters v. City of Philadelphia*, 55 F.3d 886, 892-95 (3d Cir. 1995) (discussion with newspaper reporter concerning alleged problems in operating the City of Philadelphia employee assistance program was a matter of public concern).

[7] Had this been the determinative factor in this case, the Tenth Circuit would have been required to find that Officer David's speech did involve a matter of public concern. She presented evidence of extensive newspaper coverage of her complaints of sexual harassment and concerning this lawsuit (*see, e.g.*, 10th Cir. Apndx. 418-25).

discrimination lawsuit filed by a group of high-level management police officers involved a matter of public concern. That circuit's decisions before its opinion in that case had held that similar statements both were[8] and were not[9] on matters of public concern. The *Auriemma* decision did not resolve that intracircuit split. Subsequent Seventh Circuit opinions have continued to come down on both sides of this fence.[10]

This Court needs to intervene to resolve this split in the circuits. Under the current state of the law, allegations of sexual harassment made by a public employee that would be considered a matter of public concern in Pittsburgh would be denied the same treatment in Denver. Statements by public employees are protected by the First Amendment in some circuits regardless of the speaker's motive to advance his or

---

[8] *Berg v. Hunter*, 854 F.2d 238, 241-43 (7th Cir. 1988) (accusation of public misrepresentations of staff and salary increases during a period of deficit increases involved a matter of public concern; speaker's motives were not dispositive); *Breuer v. Hart*, 909 F.2d 1035, 1037-39 (7th Cir. 1990) (allegations that male sheriff had displayed favoritism toward a female employee was a matter of public concern; speaker's motives were not dispositive).

[9] *See, e.g., Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 419-21 (7th Cir. 1988) (charges of sex discrimination did not involve a matter of public concern); *Gray*, 885 F.2d at 412-14.

[10] *Compare, e.g., Zorzi v. County of Putnam*, 30 F.3d 885, 896-98 (7th Cir. 1994) (public employee's political support of the state's attorney was a matter of public concern; speaker's motives were not dispositive) *with Hartman v. Bd. of Trustees of Community College Dist. 508*, 4 F.3d 465, 471-72 (7th Cir. 1993) (allegations of sexual harassment were not a matter of public concern where the plaintiff's "speech related predominantly to her personal interest in resolving the friction between herself" and the alleged harasser.

her own personal interests, while that motive would preclude similar public employees from receiving the same protection in other circuits. The presence or absence of media attention, and whether that attention was solicited by the public employee, is a matter of significant import in some circuits and is ignored in others.

It is unlikely that the circuits will resolve this split without review by this Court. The Third Circuit's en banc decision in *Azzaro* came after, and was made with full awareness of, the Tenth Circuit's opinion in this case. The Seventh Circuit's en banc decision in *Auriemma* is in conflict with the Tenth Circuit's reasoning and result here. Both public employees and public employers need this Court to establish a clear rule that will be applied uniformly on a national basis, without regard to the accident of where the speaker happens to have been employed.

II. The Tenth Circuit's Decision in this Case Is in Conflict with the Standards Established by this Court in *Connick v. Myers*.

At the heart of this Court's decision in *Connick* was the proposition that public employees' speech on "matters only of personal interest" do not give rise to First Amendment protection against disciplinary decisions based on the content of that speech. 461 U.S. at 147. The speech at issue in that case consisted of a questionnaire distributed to fellow employees in the District Attorney's Office in New Orleans. *Id.* at 141. There was no evidence that this dispute received public attention or publicity. It was undisputed that Ms. Myers' questionnaire was prompted by her dissatisfaction with her proposed transfer to a different section of the criminal court. *Id.* at 140. In short, Ms. Myers was speaking in her capacity as an employee, not as a citizen, in soliciting the views of her fellow employees.

Nevertheless, this Court held that the question in that questionnaire that asked whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates" did touch on a matter of public concern. *Id.* at 149. That decision was based on this Court's decisions protecting public employees from that type of political pressure. *Id.* And this Court made a point of distinguishing the facts in *Connick* from those in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415-16 (1979), which had held that a public employee's "right to protest against racial discrimination -- a matter inherently of public concern -- is not forfeited by her choice of a private forum." *Connick*, 461 U.S. at 148 n. 8.

Officer David's speech similarly involved both matters of personal interest, since they had affected her personally, and matters of public concern. The fact that she sought personal relief should not have been dispositive, since otherwise "only one not aggrieved could raise a protected matter of public concern." *Auriemma*, 910 F.2d at 1460. Indeed, even where a public employee alleges that she and other female employees had been the victim of sexual harassment, those complaints generally are based in part on her personal experiences and on her desire as an employee to have that conduct stopped. *See Wilson v. UT Health Center*, 973 F.2d 1263, 1269-70 (5th Cir. 1992).

The Tenth Circuit failed to use the test adopted by this Court that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Instead, it considered only Officer David's alleged motive in making her complaints. And instead of determining whether her speech involved "matters *only* of personal interest," *Id.* at 147

(emphasis supplied), it based its decision on its conclusion that she had "spoke[n] *primarily* in her role as an employee rather than as a citizen." *David*, 101 F.3d at 1356 (emphasis supplied). The obvious and undisputed public interest in Officer David's complaints, as shown by the newspaper coverage those complaints and this lawsuit have received, was outweighed by the fact that she was attempting to stop sexual harassment and retaliation directed against her.

Officer David's complaints were far from unique. This Court needs to exercise its supervisory role, both to correct the Tenth Circuit's failure to apply the *Connick* standards properly and to make sure that other circuits will apply those standards correctly and consistently in the future.

III. The Tenth Circuit's Failure to Use an Objective Standard on the Issue of Recusal Is in Fundamental Conflict with the Statute and with Prior Precedent

It is settled that motions for recusal under 28 U.S.C. §455(a) are to be decided through use of an objective standard. Congress enacted this law "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). A motion for recusal under the statute must "be evaluated on an *objective* basis, so what matters is not reality of the bias or prejudice but its appearance." *Litesky v. United States*, 114 S.Ct. 1147, 1154 (1994) (emphasis in original). Although the panel opinion referred to the correct test, *David*, 101 F.3d at 1350, its decision included no findings, conclusions or analysis about whether the trial judge's conduct met that objective standard.

In earlier decisions, that court had repeatedly examined whether "a reasonable person, knowing all the relevant facts,

would harbor doubts about the judges impartiality." *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987) . For example, in *Nichols v. Alley*, 71 F.3d 347, 351-52 (10th Cir. 1995), arising out of the bombing of the Murrah Federal Building in Oklahoma City, the Tenth Circuit had concluded that a reasonable person could have a basis for questioning the impartiality of a judge whose courthouse was literally rocked by that massive explosion one block away, even though there was "no allegation here of judicial impropriety" and even though this Court made a specific finding that Judge Alley had "conducted himself and these proceedings with true professionalism." *Id.* at 352. That same court had applied the same analysis in other cases in which there was no evidence of any bias or partiality by the trial judge, but in which that judge's impartiality reasonably could be questioned. *See,* e.g., *United States v. Greenspan*, 26 F.3d 1001, 1005-07 (10th Cir. 1994) (trial judge learned of alleged death threat from the FBI); *Harris v. Champion*, 15 F.3d 1538, 1570-72 (10th Cir. 1994) (one of the named defendants was an uncle of one of the judges in a three-judge panel); *United States v. Cooley*, 1 F.3d 985, 995-96 (10th Cir. 1993) (trial judge expressed his views related to the case on national television).

This case involves the extraordinary circumstances of a judge who had not only represented the chief of the police department that Petitioner was suing, but whose son's murder had been investigated by that same police department and who had had personal meetings with that police chief and other defense witnesses soon after that murder had been discovered. Not only could the trial judge's impartiality reasonably have been questioned under those circumstances, but it was. A columnist in one of Denver's two major daily newspapers publicly urged that judge to recuse himself (10th Cir. Petition for Rehearing and Suggestion for Rehearing In Banc, Exh. E).

This Court should exercise its power of supervision to reverse the Tenth Circuit's decision on this issue. The trial judge's failure to recuse himself, and the Tenth Circuit's affirmance of that decision, creates a significant potential for public cynicism about the impartiality and neutrality of the federal judiciary, at least in this case. It is impossible for any human being not to feel gratitude to persons who have helped to bring to justice the murderers of one's own flesh and blood. That would be especially difficult when the chief of that police department effectively is able to repay the favor that the judge had done for him before being appointed to the bench. And it is difficult for members of the public to believe that that judge would decide a case in his court shortly thereafter, involving that same chief and department, neutrally and impartially.

Had the Tenth Circuit used an objective standard in this case, it would have been forced to apply these standards. This Court should intervene to correct its failure to analyze this issue under the test mandated by Congress.

CONCLUSION

For the reasons stated herein, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

BARRY D. ROSEMAN
899 Logan Street, Suite 203
Denver, Colorado 80203
303/839-1771

June 30, 1997

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-1263

DOROTHY MONICA DAVID,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; JAMES COLLIER, Chief of Police, City and County of Denver; BETH MCCANN, Manager of Safety, City and County of Denver; STANLEY BANISZEWSKI; JOHN R. JOHNSON; WILLIAM HONER; JAMES LEO; CLAYTON KELLY CARPENTER,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 90-S-62)

Barry D. Roseman (George C. Price with him on the briefs), Denver, Colorado, for Plaintiff-Appellant.

J. Wallace Wortham, Jr., City Attorney, City and County of Denver, Denver, Colorado (Robert A. Dill and Casey D. Paison, DILL, DILL, CARR & STONBRAKER, P.C., Denver, Colorado, with him on the briefs), for Defendants-Appellees.

Before HENRY, SETH,* and BRISCOE, Circuit Judges.

HENRY, Circuit Judge.

Denver Police Officer Dorothy Monica David appeals the district court's judgment in favor of the City and County of Denver, Mayor Wellington Webb, former Manager of Safety Manuel Martinez, former Chief of Police Aristedes Zavaras, Captain Clayton Kelly Carpenter, Lieutenant James Leo, Sergeant William Honer, and Denver Police Officers Stanley Baniszewski and John R. Johnson on her claims of sexual harassment and retaliation pursuant to 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e to 2000e-17. Officer David advances the following arguments: (1) that the trial judge should have recused from the case because of his contacts with the Denver Police Department; (2) that the court erred in dismissing her §1983 claims against Officers Baniszewski and Johnson on the grounds that they did not act under the color of law when engaging in the alleged harassment and retaliation; (3) that the court erred in granting summary judgment to Manager of Safety Martinez, Chief Zavaras, Captain Carpenter, Lieutenant Leo, and Sergeant Honer on her §1983 retaliation claim on the grounds that her speech did not address a matter of public concern; (4) that the court erred in dismissing her §1983 claim against the City of Denver because the alleged constitutional violations were not caused by a municipal policy or custom; and (5) that the court erred in entering judgment in favor of the defendants after a bench trial on her Title VII harassment and retaliation claims.

---

* The late Honorable Oliver Seth, Senior Judge, United States Court of Appeals for the Tenth Circuit, heard oral argument in this case but did not participate in the final decision.

We exercise jurisdiction under 28 U.S.C. §1291. We conclude that the district court erred in dismissing Officer David's §1983 claim against Officers Baniszewski and Johnson. However, in all other respects, we affirm the decision of the district court.

I. BACKGROUND

Officer David began working for the Denver Police Department (the Department) in 1976 and became a regular commissioned officer in 1979. In the mid-1980s, she also worked off-duty as a security guard at an apartment complex with Officers Baniszewski and Johnson. According to Officer David, Officer Baniszewski made uninvited sexual advances toward her during their off-duty employment. She maintains that when she refused Officer Baniszewski's advances, he and Officer Johnson began to harass and threaten her and continued to do so after she reported their conduct to Department supervisors. Eventually, she asserts, Officers Baniszewski and Johnson convinced the manager of the apartment complex to fire her from her off-duty security job by making false statements about her record as a police officer.

According to Officer David, the Department failed to adequately respond to her informal complaints about Officers Baniszewski and Johnson. As a result, in April 1989, she filed a formal complaint with the Department's Internal Investigation and Inspection Bureau (the IIIB complaint). She named not only Officers Baniszewski and Johnson but her immediate supervisor, Sergeant Honer. After conducting an investigation, the Department concluded that her allegations were unfounded.

Shortly after Officer David filed the IIIB complaint, Captain Carpenter transferred her to a different shift. He

testified at trial that he made this decision in order to separate Officer David from Officers Baniszewski and Johnson. Then, on April 28, 1989, Officer David was approximately one minute late for daily roll call. Lieutenant Leo determined that disciplinary action should be taken against Officer David for tardiness. Witnesses for the Department testified at trial that Officer David had been warned about Lieutenant Leo's strict roll call policies and that she had been suspended for thirty days in May 1988 for chronic tardiness. Under the terms of the May 1988 suspension order, twenty days of the suspension were held in abeyance on the condition that Officer David was not further disciplined for tardiness for one year.

Pursuant to Lieutenant Leo's decision, the disciplinary case against Officer David for being late for roll call was referred to Chief Zavaras. He recommended a twenty day suspension, and Manager of Safety Martinez approved his recommendation. However, Officer David appealed to the Denver Civil Service Commission, and a hearing officer eventually vacated the suspension.

On May 3, 1989, Officer David filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she had been sexually harassed by a coworker. She asserted that she had complained about the harassment to her supervisors but that "[n]o corrective action has been taken to stop the harassment nor has any disciplinary action been taken against the harasser." Aplt's App. vol. I, at 138. She also alleged that she had been threatened with a ninety day suspension within the next month.

On Monday May 16, 1989, Officer David arrived at roll call ten minutes before her normal reporting time. She had been informed by her supervisor on the previous Friday that she should report an hour early. The duty sergeant reported

her tardiness, and the matter was again referred to Chief Zavaras, who set it for hearing in August 1989.

In June 1989, Officer David sent a letter to the Denver City Attorney announcing that she would pursue claims against the City and individual police officers for sexual harassment and retaliation. She referred to sexual harassment by Officer Baniszewski and a pattern of discrimination and harassment by Officers Baniszewski and Johnson when she refused Officer Baniszewski's advances. She also repeated the allegations that her supervisors failed to take adequate action regarding the harassment and retaliated against her for complaining about the harassment by pursuing unwarranted disciplinary actions against her. In July 1989, Officer David filed a second EEOC complaint alleging that the sexual harassment and retaliation had continued.

In August 1989, Chief Zavaras conducted a hearing concerning the May 16th roll call incident. In light of her previous record of tardiness, Chief Zavaras recommended a six months' suspension. Pursuant to Department procedure, the matter was referred to Manager of Safety Martinez, who accepted Chief Zavaras's recommendation. Officer David appealed the case to the Denver Civil Service Commission, which reduced the suspension to three months.

Officer David filed the instant case in January 1990. She asserted a §1983 sexual harassment claim against Officers Baniszewski and Johnson, a §1983 claim for violation of her First Amendment rights against the City of Denver, Manager of Safety Martinez, Chief Zavaras, Captain Carpenter, Lieutenant Leo, and Sergeant Honer, and Title VII sexual harassment and retaliation claims against all of the defendants. The defendants filed a motion to dismiss all of the §1983 claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motion for dismiss

as to Officers Baniszewski and Johnson, the City of Denver, and Mayor Wellington Webb but denied the motion as to the remaining individual defendants. With regard to Officers Baniszewski and Johnson, the court reasoned that the allegations concerned off duty actions not taken under color of law. As to the City of Denver and Mayor Wellington Webb, the court said that there was no municipal policy underlying the alleged constitutional violations.

Shortly before trial, the remaining individual defendants filed a motion for summary judgment arguing that Officer David's complaints about sexual harassment and retaliation did not address matters of public concern and that, as a result, they were entitled to summary judgment on her §1983 First Amendment claim. The court granted the motion and proceeded to trial on only the Title VII sexual harassment and retaliation claims.

At the final pretrial status conference, the trial judge informed the parties that he was acquainted with the following witnesses listed by the defendants: David Michaud, who had succeeded Mr. Zavaras as Denver Police Chief; Denver Police Sergeant Armedia Gordon; Manager of Safety Martinez; and Denver Police Captain Tine Rowe. The judge reported that he had represented Chief Michaud in his official capacity as Deputy Sheriff in a §1983 action filed over twenty years ago. Between the conclusion of the §1983 case and December 1992, the judge stated, he had four or five casual conversations with Chief Michaud. Then, in December 1992, the judge's son was murdered. The judge recalled two or three conversations with Chief Michaud about the homicide investigation.

The judge's contacts with the other witnesses were more limited. He stated that he had spoken with Sergeant Gordon during the investigation of his son's murder. He also told the

parties that, when he was on the state trial bench, Mr. Martinez had appeared before him as a public defender. He remembered several passing conversations with Mr. Martinez in the course of trying cases. Finally, the trial judge said that although he did not recall meeting captain Tine Rowe, he was familiar with her work as a police officer.

Following the judge's disclosures, Officer David filed a motion for disqualification pursuant to 28 U.S.C. §455(a). She argued that, in light of the Department's investigation of his son's murder and his acquaintance with defense witnesses, the judge could not be impartial and that, "[a]t an absolute minimum, these circumstances create an appearance of impropriety." *See* Aplt's App. vol. II, at 243. The trial judge denied the motion, concluding that his impartiality could not reasonably be questioned.

After a bench trial, the court issued findings of fact and conclusions of law rejecting Officer David's Title VII claims. In analyzing the sexual harassment claim, the court observed that "[t]he evidence regarding Officer Baniszewski's actions toward [Officer David], which were of a sexual nature, was relatively clear. However, those actions occurred in an off-duty employment setting, over which the police officials named as Defendants had no control." *See* Aplt's App. vol. II, at 407. With regard to the retaliation claim, the court concluded that Officer David had failed to establish a causal connection between her complaints concerning sexual harassment and the disciplinary action against her. The court also found that the defendants had presented legitimate, nondiscriminatory reasons for the disciplinary actions and that Officer David had not demonstrated that these reasons were pretextual.

II. DISCUSSION

A. Motion to Disqualify the Trial Judge

Because Officer David's allegations regarding the trial judge implicate all of the court's rulings, we begin with this issue. A federal statute provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *See* 28 U.S.C. §455(a). "The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir.1987). We review the district court's decision for an abuse of discretion. *See United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir.1992), *cert. denied*, 507 U.S. 1033 (1993).

Officer David argues that because of his contact with the Denver Police Department, including his representation of Chief Michaud over twenty years ago, the trial judge should have granted the §455(a) motion for disqualification. She contends that the judge's questioning of several defense witnesses at trial demonstrates that he was not impartial. For several reasons, we are not persuaded by this argument. First, under §455(a), a judge's prior representation of a witness or a party in an unrelated matter does not automatically require disqualification. *See United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir.1978), *cert. denied*, 439 U.S. 1072 (1979). Moreover, there is no indication in the record that the trial judge's prior contact with Chief Michaud, Manager of Safety Martinez or the various defense witnesses affected his management of the case or his factual findings and legal conclusions. Additionally, after a careful review of the record on appeal, we do not find any evidence of partiality in the

judge's questioning of witnesses, a practice authorized by Fed.R.Evid. 614(b) and used here to clarify testimony.

In today's era of crowded dockets, recusal has become more complicated. Although the test in this circuit is one of reasonableness, it is reasonableness tempered with a knowledge of the relevant facts. It is hardly possible for a judge with criminal jurisdiction to have no knowledge of some personnel in law enforcement. We must examine the judge's discretionary decision not to recuse both in light of the judge's duty to decide cases fairly and his duty to avoid impropriety, determined from an informed, reasonable viewpoint. "There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman*, 831 F.2d at 939. Our review of these matters leads us to conclude that the trial judge did not abuse his discretion in denying Officer David's motion for disqualification pursuant to 28 U.S.C. §455(a).

B. Dismissal of §1983 Claims against Officers Baniszewski and Johnson

Officer David argues that the district court erred in dismissing her §1983 sexual harassment claims against Officers Baniszewski and Johnson on the grounds that their actions were not taken under color of law. As a preliminary matter, we note that the record is somewhat unclear as to whether the district court dismissed the claims against Baniszewski and Johnson pursuant to Fed.R.Civ.P. 12(b)(6) or whether the court granted summary judgment in their favor pursuant to Fed.R.Civ.P. 56. As stated above, the defendants filed a joint motion to dismiss Officer David's §1983 claim pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. The motion and supporting brief challenged the complaint on its face and did not refer to any evidentiary materials. Officer David filed a response to

the defendants' motion and attached an affidavit in which she discussed the circumstances of her off-duty employment as a security guard and described some of the evidence that she planned to present at trial.

The district court then heard oral argument on the defendants' motion and ruled from the bench. As to the allegations against Officer Baniszewski and Johnson, the court examined the complaint and concluded that it did not state a claim because the alleged conduct "occurred in their private lives." *See* Aplt's App. vol. I, at 45. However, the written order memorializing the court's ruling states that "[t]he motion to dismiss the Plaintiff's second claim for relief, under 42 U.S.C. §1983, was treated as a motion for summary judgment." *Id.* at 57.

In her appellate brief, Officer David characterizes the court's ruling on her claims against Officers Baniszewski and Johnson as the grant of a Fed.R.Civ.P 12(b)(6) motion. *See* Aplt's Br. at 11. In contrast, the officers maintain that the court granted summary judgment in their favor. *See* Aples' Br. at 3-4. They contend that the court converted their motion to dismiss into a motion for summary judgment because Officer David submitted evidence outside the pleadings in her response. *See id.*

Fed.R.Civ.P. 12(b) provides that if "matters outside the pleading are presented to and not excluded by the court, [a Rule 12(b)(6) motion] shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Therefore, a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) cannot be converted into a summary judgment motion without notice and an opportunity for the parties to present relevant evidence. *See Brown v. Zavaras*, 63 F.3d 967, 969

(10th Cir.1995); *Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419, 1423 (10th Cir.1993); *Ketchum v. Cruz*, 961 F.2d 916, 919 (10th Cir.1992); *United States v. Gutierrez*, 839 F.2d 648, 651 (10th Cir.1988). The required notice may be actual or constructive, and in some circumstances, courts have concluded that the submission of evidentiary materials by the movant, the nonmovant, or both of them constitutes sufficient notice. *See Nichols v. United States*, 796 F.2d 361, 364 (10th Cir.1986) ("[F]ailure to give notice is not reversible error if a party does not attempt to exclude the supporting documents, but files its own sworn affidavits in response."); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir.) ("A represented party who submits matters outside the pleadings to the judge and invites consideration of them has notice that the judge may use them to decide a motion originally noted as a motion to dismiss, requiring its transformation to a motion for summary judgment."), *cert. denied*, 474 U.S. 826 (1985).

In the instant case, although the issue is close, the record fails to establish that the parties received sufficient notice of the conversion of the defendants' Rule 12(b)(6) motion to a motion for summary judgment. Even though Officer David submitted evidentiary materials in response to the motion to dismiss, the transcript of the motions hearing indicates that the district court only considered the allegations of the complaint rather than the evidentiary materials. *See* Aplt's App. vol. I, at 45 ("I'm looking at *the four corners of the complaint* here. . . . I don't think there's any cause of action against Baniszewski and Johnson.") (emphasis added). In light of its decision at the hearing to treat the defendants' motion as directed at the four corners of the complaint, it was not proper for the court to subsequently convert its ruling into the grant of a summary judgment motion without further notice to the parties. *Cf. Jarvis*, 985 F.2d at 1423-24

(concluding that, because the nonmovant had the opportunity to object, the parties received the required notice when the court announced at the beginning of a motions hearing that a motion to dismiss would be treated as a motion for summary judgment). Accordingly, we will treat the district court's decision as the dismissal of the §1983 claims against Baniszewski and Johnson pursuant to Fed.R.Civ.P. 12(b)(6). See *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499, 1503 (10th Cir.1994) ("[A] court's failure to comply with the notice requirements of Rule 56 constitutes harmless error if the dismissal can be justified under Rule 12(b)(6) standards without reference to matters outside the plaintiff's complaint.").

In reviewing the grant of a 12(b)(6) motion, we apply the same standards as the district court. *See Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir.1995). "We 'must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.'" *Gagan v. Norton*, 35 F.3d 1473, 1474 n.1 (10th Cir.1994) (quoting *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir.1991)), *cert. denied*, 115 S.Ct. 1175 (1995). A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only "if the plaintiff can prove no set of facts to support a claim for relief." *Jojola*, 55 F.3d at 490; *see also Noland v. McAdoo*, 39 F.3d 269, 273 (10th Cir.1994). Applying these standards, we must determine whether Officer David can prove any set of facts that would establish that Officers Baniszewski and Johnson acted under color of law when they allegedly engaged in the sexual harassment and retaliation described in her complaint.

As the parties have noted, §1983 creates a cause of action against individuals who violate federal law while acting "under color of state law." *See* 42 U.S.C. §1983; *Jojola*, 55

F.3d at 492. "The traditional definition of acting under color of state law requires that the defendant in a §1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). The defendant's authority may be actual or apparent. *Jojola*, 55 F.3d at 493. However, "it is the plaintiff's burden to plead, and ultimately establish, the existence of 'a real nexus' between the defendant's conduct and the defendant's 'badge' of state authority in order to demonstrate action was taken 'under color of state law.'" *Id.* at 494.

A number of courts have applied §1983's color of law requirement to the conduct of off-duty police officers. *See*, e.g, *Martinez v. Colon*, 54 F.3d 980, 986-89 (1st Cir.), *cert. denied*, 116 S.Ct. 515 (1995); *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118-19 (7th Cir.1995); *Barna v. City of Perth Amboy*, 42 F.3d 809, 815-19 (3d Cir.1994); *Pitchell v. Callan*, 13 F.3d 545, 547-49 (2d Cir.1994); *United States v. Tarpley*, 945 F.2d 806, 808-09 (5th Cir.1991), *cert. denied*, 504 U.S. 917 (1992). The under color of law determination rarely depends on a single, easily identifiable fact, such as the officer's attire, the location of the act, or whether or not the officer acts in accordance with his or her duty. *Martinez*, 54 F.3d at 986. Instead one must examine "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id.* Courts have described the central inquiry in varying terms. According to the First Circuit, "[t]he key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." *Id.* For the Seventh Circuit, the fundamental question is "whether [the officer's] actions related

in some way to the performance of a police duty." *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir.1990).

Several decisions of this circuit illustrate the application of the under color of law requirement to police officers and other state officials. In *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1429-30 (10th Cir.1984), *cert. granted, judgment vacated and remanded for reconsideration on other grounds*, 474 U.S. 805, *and cert. denied*, 474 U.S. 818 (1985), we stated that the defendant acted under color of law when he stopped a suspected shoplifter, flashed his badge, identified himself as a police officer providing security for the store, told the suspect that he was under arrest, and subsequently used police documents to complete a citizen's arrest form. We said that these facts supported the conclusion that the defendant was functioning as an on-duty police officer and could therefore be held liable under §1983. *Id.*

In other circumstances involving state employees we have reached the opposite conclusion. For example, in *D.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176, 1186-88 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990), we concluded that a teacher who sexually abused a student during a summer vacation had not acted under color of law. We focused on the fact that, during the vacation months, the teacher was free of all obligations to the school district. *Id.* at 1187. We rejected the argument that the teacher's "cloak of authority" satisfied the color of law requirement, reasoning that there was no real nexus between the sexual abuse and the public school. *Id.* at 1188; *see also Jojola*, 55 F.3d at 493-94 (dismissing §1983 claim against school janitor alleged to have sexually molested a student because the defendant did not act under color of law).

Similarly, in a recent decision, we concluded that even on-duty law enforcement officers do not act under color of

law in certain circumstances. In *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir.1996), we held that police officers who staged a robbery of a convenience store (as a practical joke on an acquaintance who worked there) did not act under color of law because they did not use their state authority to carry out their plan. We reached this conclusion in spite of the fact that the on-duty officers had used a number of items of police property. *See id.* at 1513 (Jones, J., concurring in part and dissenting in part).

Finally, this circuit has applied §1983's color of law requirement to allegations of sexual harassment. In *Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir.1992), *cert. denied*, 509 U.S. 923 (1993), we observed that liability for sexual harassment under the Equal Protection Clause of the Fourteenth Amendment is generally based on some authority that the defendant has over the victim. "Otherwise, it is difficult to establish that the abusive action was perpetrated 'under color of state law' rather than as an essentially private act of sexual harassment." *Id.* We noted that a number of courts had declined to hold a coemployee of the plaintiff liable for sexual harassment under §1983 when the harassment did not involve the use of state authority. *Id.* at 1400. Although several of the defendants in *Woodward* were not supervisors, we did not rule out the possibility that nonsupervisory coemployees could be liable for sexual harassment under §1983 in some instances. However, we did not resolve that issue, holding instead that the nonsupervisory defendants were entitled to qualified immunity because they were not violating clearly established law under the Equal Protection Clause when they harassed plaintiffs. *Id.* at 1400-01. In a subsequent decision, we noted that "in order to establish the state action necessary to support a §1983 [Fourteenth Amendment sexual harassment claim], [the defendant] had to be plaintiff's supervisor or in some other

way exercise state authority over her." *See Noland*, 39 F.3d at 271.

In the instant case, accepting the allegations of Officer David's complaint as true and affording her the benefit of favorable inferences pursuant to Fed.R.Civ.P. 12(b)(6), Officer David may be able to establish that Officers Baniszewski and Johnson acted under color of law when they engaged in the sexual harassment at issue. In particular, Officer David's complaint alleges that all of the defendants acted under color of law. Aplt's App. at 4. Although the complaint characterizes the two officers as coemployees of Officer David, *see id.* at 3, we note that in certain instances coemployees may exercise de facto authority over sexual harassment victims such that they act under color of law. *See Poulsen v. City of N. Tonawanda*, 811 F.Supp. 884, 895 (W.D.N.Y.1993) (concluding that a factual dispute about a defendant's de facto authority over the plaintiff precluded summary judgment on a §1983 Fourteenth Amendment sexual harassment claim). Thus, if Officer David can establish that, in committing the alleged sexual harassment, Officers Baniszewski and Johnson had supervisory authority over her or in some other way exercised state authority over her, *see Noland*, 39 F.3d at 271, then she may be able to recover on her §1983 Fourteenth Amendment sexual harassment claim. We therefore conclude that the district court erred in dismissing Officer David's §1983 claim against Officers Baniszewski and Johnson.[1]

---

[1] We note that in their motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), Officers Baniszewski and Johnson did not assert the defense of qualified immunity. Accordingly, we do not here address the question of whether Officer David's complaint alleges that in sexually harassing her Officers Baniszewski and Johnson violated "'clearly established ... constitutional rights of which a reasonable person would have known."

C. First Amendment Claim

Officer David challenges the district court's grant of summary judgment to Manager of Safety Martinez, Chief Zavaras, Captain Carpenter, Lieutenant Leo, and Sergeant Honer on her First Amendment claim under §1983. The district court held that because Officer David's complaints about sexual harassment and retaliation did not address matters of public concern, these defendants were all entitled to qualified immunity. Officer David argues on appeal that her complaints about retaliation and harassment did involve matters of public concern and that summary judgment was not warranted.

We engage in de novo review of the district court's grant of summary judgment, applying the same standards as the district court under Fed.R.Civ.P. 56(c). *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Factual disputes must be resolved and inferences drawn in favor of Officer David, the nonmoving party. *Bisbee v. Bey*, 39 F.3d 1096, 1100 (10th Cir.1994), *cert. denied*, 115 S.Ct. 2577 (1995); *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir.1993). Summary judgment is warranted only if the uncontroverted material facts establish that the moving party is entitled to judgment as a matter of law.

The district court's grant of summary judgment was based on the doctrine of qualified immunity, which protects public officials performing discretionary functions unless their conduct violates "'clearly established statutory or constitutional rights of which a reasonable person would have

---

Woodward, 977 F.2d at 1396 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

known.'" *Jantz v. Muci*, 976 F.2d 623, 627 (10th Cir.1992) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)), *cert. denied*, 508 U.S. 952 (1993). Because Officer David asserts that the defendants violated her clearly established First Amendment rights as a public employee, we must examine the contours of that right in order to determine whether the district court's grant of summary judgment to the defendants was proper. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Supreme Court has established a two-part test for evaluating the claims of public employees alleging that their employers have retaliated against them for exercising their First Amendment rights. *See Connick v. Myers*, 461 U.S. 138, 142-54 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). First, one must determine whether the plaintiff's statements can be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U.S. at 146. Second, courts must determine whether the "'interests of the [employee], as a citizen, in commenting upon matters of public concern'" outweigh the "'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* at 142, (quoting *Pickering*, 391 U.S. at 568); *see also Workman v. Jordan*, 32 F.3d 475, 482-83 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1357 (1995); *Starrett v. Wadley*, 876 F.2d 808, 815 (10th Cir.1989); *Conaway v. Smith*, 853 F.2d 789, 795-96 (10th Cir.1988). It is the threshold question of whether Officer David's speech involved a matter of public concern that is at issue here.

In deciding whether a particular statement involves a matter of public concern, the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen. *See Connick*, 461 U.S. at 147. Speech that pertains to a public

agency's "discharging its governmental responsibilities" ordinarily will be regarded as speech on a matter of public concern. *See id.*, 461 U.S. at 148. In contrast, speech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern. *See id.* at 147-49; *Woodward*, 977 F.2d at 1403. In distinguishing between these two categories of speech, courts must consider the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. "The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances [and therefore spoken as an employee] or to address a broader public purpose [and therefore spoken as a citizen]." *Workman*, 32 F.3d at 483.

In *Woodward*, we examined a First Amendment claim in which employees of a county sheriff's department alleged that their supervisors and coemployees had retaliated against them after they filed formal sexual harassment complaints against a police officer and an undersheriff. 977 F.2d at 1403-04. We concluded that the sexual harassment complaints addressed personal matters, reasoning that the thrust of the plaintiff's speech was that "they personally were being subjected to sexual harassment and they wanted it to stop." *Id.* We added that although there were several general references in the complaints to the possibility that other women had been sexually harassed, the purpose of the complaints was to address personal grievances rather than to assert that the sheriff's office had failed to discharge its official responsibilities. *Id.* at 1404.

However, we also explained that the fact that the plaintiffs' complaints involved personal grievances about internal employment conditions was not the end of the inquiry. We noted that in *Connick*, the Supreme Court

distinguished one question from the remainder of a questionnaire distributed by an assistant district attorney to her colleagues. The question asked whether assistant district attorneys felt pressure to work on political campaigns. The Supreme Court characterized that question as involving fundamental constitutional rights and therefore addressing a matter of public concern. *See Connick*, 461 U.S. at 149; *Woodward*, 977 F.2d at 1404. Interpreting *Connick*, we stated in *Woodward* that "even speech that focuses on internal employment conditions and is made in the context of a personal dispute may be regarded as pertaining to a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting." 977 F.2d at 1404. Nevertheless, applying the doctrine of qualified immunity, we stated in *Woodward* that we were aware of no case holding that speech similar to the plaintiffs' complaints that they were personally subjected to sexual harassment constituted speech on a matter of public concern. *Id.* We therefore concluded that the defendants were entitled to qualified immunity on the First Amendment claims. *Id.*[2]

In the instant case, we must apply these principles to determine whether the statements made by Officer David before the alleged retaliatory actions addressed matters of public concern. In particular, we must examine the three written complaints that were made by Officer David prior to

---

[2] A number of courts have agreed with *Woodward's* conclusion that complaints framing sexual harassment allegations as personal grievances rather than as a widespread practice affecting the agency's performance of its public responsibilities do not constitute speech on a matter of public concern. *See*, e.g., *Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir.1993), *cert. denied*, 14 S.Ct. 2708 (1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 143 (2d Cir.1993), *cert. denied*, 510 U.S. 1164 (1994); *Gray v. Lacke*, 885 F.2d 399, 411 (7th Cir.1989), *cert. denied*, 494 U.S. 1029 (1990).

the imposition of the six month suspension by Chief Zavaras and Manager of Safety Martinez in August 1989 -- her two EEOC complaints and her June 30, 1989 letter to the Denver City Attorney.

Upon review of these complaints, we conclude that Officer David spoke primarily in her role as an employee rather than as a citizen. Like the complaints we analyzed in *Woodward*, Officer David's complaints and letter allege that she has been personally subjected to sexual harassment, retaliation, and unwarranted disciplinary action. Her allegations focus on the conditions of her own employment, and in neither the EEOC complaints nor the letter to the City Attorney does Officer David allege that other employees have been subjected to harassment or retaliation or that the harassment and retaliation has interfered with the Department's performance of its governmental responsibilities. Therefore, Officer David's statements do not involve matters of public concern under the *Connick* standard.

In her appellate brief Officer David argues that *Woodward* is not controlling because this circuit has recognized that sexual harassment involves matters of public concern. She cites *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir.1989) and *Wren v. Spurlock*, 798 F.2d 1313 (10th Cir.1986), *cert. denied*, 479 U.S. 1085 (1987). In *Wulf*, this circuit concluded that a police officer's letter to the Kansas Attorney General requesting an investigation of the Wichita Police Department addressed matters of public concern. 883 F.2d at 857-58. The letter alleged interference with the police officer's right to join a union, unfair treatment of the union, misuse of public funds, and sexual harassment of one officer by a supervisor. *Id.* at 849-50. Significantly, the sexual harassment allegation did not involve the officer who had written the letter. Similarly, in *Wren* we held that a letter

written by a group of teachers to a state education association and requesting an investigation of a public school principal involved matters of public concern. 798 F.2d at 1317-18 n.1. The letter included allegations of sexual harassment of several students and teachers. *Id.* at 1317.

The complaints at issue in *Wulf* and *Wren* contrast sharply with the statements of Officer David at issue here. In particular, the *Wulf* and *Wren* complaints both involved allegations that the public agency or official was not properly performing governmental responsibilities. In neither case did the complaints involve allegations that focused exclusively on the conditions of the complainants' own employment. Moreover, neither case establishes a rule that allegations of sexual harassment inherently involve matters of concern under the *Connick* standard.

Accordingly, following *Woodward*, we conclude that because Officer David's EEOC complaints and her letter to the Denver City Attorney did not involve matters of public concern under the *Connick* standard, the district court properly granted summary judgment to Manager of Safety Martinez, Chief Zavaras, Captain Carpenter, Lieutenant Leo, and Sergeant Honer on Officer David's §1983 First Amendment claim.

D. First Amendment Claim Against the City and County of Denver

Officer David also argues that the district court erred in dismissing her §1983 claims against the City and County of Denver (the City). The defendants sought dismissal of the §1983 claim against the City in the same Fed.R.Civ.P. 12(b)(6) motion in which they sought dismissal of the individual claims against Officers Baniszewski and Johnson. In ruling from the bench that the claim against the City should

be dismissed, the court stated that there was no municipal policy or custom underlying the alleged harassment and retaliation and told Officer David's attorney that "what you're attempting to do here is apply vicarious liability on the city for the actions of, or the purported actions of the [individual] defendants." *See* Aplt's App. vol. I, at 48. In announcing its ruling, the court did not refer to the affidavit submitted by Officer David in response to the defendants' motion to dismiss, and there is no indication in its remarks that its decision was based on anything but a reading of Officer David's complaint. However, in its written ruling memorializing the dismissal of the §1983 claim against the City, the court stated that it had treated the motion to dismiss as a motion for summary judgment. *See* Aplt's App. vol. I, at 57. For the reasons we set forth in our discussion of the claims against Officers Baniszewski and Johnson, we treat the court's ruling as the grant of a motion to dismiss the §1983 claim against the City pursuant to Fed.R.Civ.P. 12(b)(6).

As the district court observed, municipalities may be held liable on §1983 claims only if a municipal policy or custom causes a violation of federal law. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). The Supreme Court has held that a municipal policy may include not only policy statements, ordinances, and regulations but the individual decisions of city officials who have "final policymaking authority." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion); *see also Randle v. City of Aurora*, 69 F.3d 441, 447-49 (10th Cir.1995). Municipal customs -- for which a city may also be held liable under §1983 -- have been defined as "persistent and widespread discriminatory practices of ... officials." *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

Officer David argues on appeal that the district court erred in dismissing her §1983 claim against the City because she alleged that retaliatory disciplinary actions were taken against her by two officials with final policymaking authority -- Manager of Safety Martinez and Chief Zavaras -- and because she alleged that a municipal custom had caused a violation of her constitutional rights. With regard to the latter allegation, she cites paragraph 16 of her complaint, which alleges that "[o]ther female police officers employed by Defendant City and County of Denver have received sexual harassment from their fellow, male officers" and that these female officers "have complained about such sexual harassment to their superiors either, without receiving any affirmative, effective relief or receiving harassment and retaliation as a result of their having filed such complaints." *See* Aplt's App. vol. I, at 3. The defendants respond that it was the Denver City Commission rather that Manager Martinez or Chief Zavaras that was the final policymaker with respect to the disciplinary actions against Officer David. The defendants also argue that the complaint's reference to sexual harassment of other officers is insufficient to allege that it was a municipal custom that caused the asserted constitutional violations.

Under the 12(b)(6) standards, the district court's dismissal of the §1983 claim against the City appears premature. Applicable provisions of the Denver Municipal Code do provide support for the City's contention that it is the Denver Civil Commission rather than Chief Zavaras or Manager of Safety Martinez that was the final policymaker with regard to the challenged disciplinary actions. *See* Aplt's App., vol. I, at 38-41 (citing Denver Municipal Code §§C5.73-1 to C5.73-2(8)). However, the fact that Chief Zavaras and Manager of Safety Martinez were not final policymakers does not establish that the City could never be

held liable for the violations alleged in Officer David's complaint. In certain instances, a reviewing body such as the Civil Service Commission may ratify the personnel decisions of subordinate officials and the reasons for them. In those instances, the reviewing body may constitute the final policymaker, and its actions may render a municipality liable under §1983. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion) ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because the decision is final."); *Ware v. Unified Sch. Dist. No. 492*, 902 F.2d 815, 819-20 (10th Cir.1990) (concluding that there was evidence in the record to support the plaintiff's claim that a school board acted with deliberate indifference to her First Amendment rights in approving a superintendent's decision to fire her). Accepting the allegations of Officer David's complaint as true and affording her the benefit of all favorable factual inferences, we cannot say that she could prove no set of facts under which the Denver Civil Service Commission, as the final policymaker for the City of Denver, ratified the assertedly retaliatory actions.

Nevertheless, we also conclude that the court's premature dismissal of the §1983 claim against the City was harmless error. Officer David's claim against the City involves the same allegation that she made in her §1983 claim against Manager of Safety Martinez, Chief Zavaras, Captain Carpenter, Lieutenant Leo, and Sergeant Honer -- that her First Amendment rights were violated when city officials retaliated against her for speaking about a matter of public concern. Thus, our conclusion that Officer David's statements did not address matters of public concern under the *Connick* standard suggests that, like the individual defendants,

the City is entitled to summary judgment on her §1983 First Amendment claim.

However, we note that because of the district court's dismissal of the §1983 claim against the City pursuant to the defendants' Fed.R.Civ.P. 12(b)(6) motion, Officer David did not have the opportunity to respond to a summary judgment motion and accompanying evidentiary materials that specifically addressed her First Amendment claim against the City. In this procedural posture, when a district court prematurely dismisses a claim prior to trial, we must determine whether the court could have entered summary judgment sua sponte. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1533 (9th Cir.1995). The entry of summary judgment sua sponte is warranted only when the following conditions are met: (1) there is no dispute of material fact; (2) the losing party has had an adequate opportunity to address the issues involved, including an adequate time to develop any facts necessary to oppose summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Fuller*, 47 F.3d at 1533.

These conditions are satisfied with regard to Officer David's First Amendment claim against the City. There is no dispute of material fact as to the statements that she made before the six months' suspension was imposed by Manager of Safety Martinez and Chief Zavaras. Moreover, the issues relevant to Officer David's First Amendment claim against the City were fully argued in the individual defendants' motion for summary judgment and Officer David's response to that motion. *Cf. Hand v. Matchett*, 957 F.2d 791, 794 n.2 (10th Cir.1992) (affirming grant of summary judgment sua sponte when the defendants "had adequate opportunity to address all pertinent issues in the case prior to the court's decision"); *Graham v. City of Oklahoma City*, 859 F.2d 142, 144 (10th

Cir.1988) (same). Therefore, even though the district court granted the City's Fed.R.Civ.P. 12(b)(6) motion prematurely, subsequent proceedings in the case authorized the court to enter summary judgment in favor of the City on the First Amendment claim. Accordingly, we conclude that the district court's judgment in favor of the City on her §1983 First Amendment claim should be affirmed.

E. Title VII Claims

Finally, Officer David challenges the district court's conclusion that there were non-discriminatory, non-retaliatory reasons for the disciplinary actions taken against her and that, as a result, she was not entitled to relief on her Title VII claims for sexual harassment and retaliation. She focuses on the evidence that she presented at trial that several male police officers with as many or more tardiness violations received much less severe discipline. She maintains that the defendants failed to adequately explain this difference in treatment. Officer David also points to Chief Zavaras's decision to require her to undergo a psychiatric examination. She notes that the order requiring the examination was issued one day after the Department received her notice of her intent to file a lawsuit and maintains that this sequence of events establishes the defendants' retaliatory motive. We review the district court's findings regarding the existence of actionable sexual harassment for clear error. *E.E.O.C. v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir.1992); *Archuleta v. Colorado Dep't of Insts.*, 936 F.2d 483, 487 (10th Cir.1991).

In assessing the evidence regarding disciplinary actions against male officers, the district court observed that many of the proceedings occurred before Chief Zavaras assumed command of the Department. The court also noted Chief Zavaras's trial testimony that he had discovered a serious tardiness problem when he first became Chief and that, in

response to the problem, he had adopted a policy of treating tardiness violations more severely than his predecessor. Additionally, the court found a lack of consistency in the Department's recordkeeping regarding disciplinary actions and concluded that it was difficult to meaningfully compare the treatment received by various officers. For all of these reasons, the court stated, the evidence regarding the less severe actions taken against male officers did not warrant a finding of discrimination or retaliation under Title VII. As to the psychiatric examination, the court found the timing of Chief Zavaras's order insufficient to establish a retaliatory motive.

Upon review of the record and the applicable law, we do not agree with Officer David that the evidence that male officers received less severe discipline establishes that the district court erred in rejecting her Title VII claims. "Title VII does not ensure that employees will always be treated fairly or that they will be [disciplined] only for meritorious reasons." *Archuleta*, 936 F.2d at 487. As Judge Ebel has observed:

> Differences in treatment are inevitable, and even irrational or accidental differences of treatment occur in most business organizations of any size. Differential treatment not premised on rational business policy may in some instances support an inference of illegal discriminatory intent, and a fact finder may, upon an appropriate record, infer that an illegal discriminatory motive lies behind otherwise irrational business conduct that disadvantages a protected status employee. However, such conclusion is not compelled as a matter of law. Sometimes apparently irrational differences in treatment between different employees that cannot be

> explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, or that events occurred at different times when the company's attitudes toward certain infractions were different, or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, or even that the less severely sanctioned employee may be more valuable to the company for nondiscriminatory reasons than is the other employee. Other times, no rational explanation for the differential treatment between the plaintiff and the comparison employees may be offered other than the inevitability that human relationships cannot be structured with mathematical precision, and even that explanation does not compel the conclusion that the defendant was acting with a secret, illegal discriminatory motive.

Flasher, 986 F.2d at 1320 (citations and footnotes omitted).

These principles support the district court's decision here. In light of Chief Zavaras's testimony that the disciplinary action against Officer David was imposed because of her record of previous violations and his concerns about widespread tardiness within the Department, it was not clearly erroneous for the district court to reject her claims of harassment and retaliation. Accordingly, we affirm the district court's judgment for the defendants on her Title VII claims.

III. CONCLUSION

For the reasons set forth above, we REVERSE the district court's dismissal of Officer David's §1983 claim against Officers Baniszewski and Johnson and REMAND the case for further proceedings consistent with this opinion. In all other respects, we AFFIRM the decision of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-S-62

DOROTHY MONICA DAVID,

Plaintiff,

v.

CITY AND COUNTY OF DENVER; ARISTEDES ZAVARAS, Chief of Police, City and County of Denver; MANUEL MARTINEZ, Manager of Safety, City and County of Denver; WILLIAM HONER; JAMES LEO; and CLAYTON KELLY CARPENTER,

Defendants.

ORDER

THIS MATTER comes on for hearing on Plaintiff's Motion for Disqualification of Trial Judge filed November 22, 1993 at 10:58 a.m., with a response by Defendants filed the same date filed at 5:03 p.m., and an amended response filed November 23, 1993, at 10:28 a.m.

This matter came on for hearing at 4:00 p.m., November 23, 1993, the Court having given counsel an opportunity to elaborate as they deemed necessary on their respective positions, having now heard comments of counsel, makes the following order.

BACKGROUND

Plaintiff's motion for disqualification arises out of comments made at the final status conference held in this case on Friday, November 12, 1993, trial now being set to commence on Monday, November 29, 1993 at 9:00 a.m. At the status conference in question, counsel for the Defendants tendered their final witness list together with other trial documents. The witness list contained the names of Denver Police Chief David Michaud, Denver Police Sergeant Armedia Gordon, Manuel Martinez, and Denver Police Captain Tina Rowe.

Under §§455(a), a Judge is under a continuing duty to ask himself what a reasonable person knowing all the relevant facts would think about his impartiality. *U.S. v. Hines*, 696 F.2d 722 at 728 (10th Cir. 1982) (quoting *U.S. v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976)).

In accordance with this continuing duty of disclosure, the Court's acquaintance with the above-referenced individuals was disclosed at the status conference.

This Court's acquaintance with the named individuals is as follows:

1. The undersigned represented Chief Michaud in the case of *Schindelar v. Welch*, tried in the United States District Court for the District of Colorado before the Honorable William Doyle, then judge of this Court, over 20 years ago. At that time, the undersigned represented then Deputy Sheriff Michaud individually in a case involving allegations under 42 U.S.C. §1983, pursuant to a policy of insurance affording indemnity to then Deputy Sheriff Michaud as a member of the Sheriff's Department of Weld County, Colorado. The undersigned has never represented Chief David Michaud as

his personal attorney. Following this case, the undersigned has had brief casual conversations with Chief Michaud on probably four or five occasions prior to December of 1992, at which time Chief Michaud in his official capacity as Chief of the Denver Police Department headed the investigation of the killing of the undersigned's son, Douglas Sparr. During that investigation, the Court recalls two or three conversations with Chief Michaud relative to the investigation.

2. The Court's contact with Sergeant Armedia Gordon was also during the investigation of the above-referenced homicide. Sergeant Gordon interrogated the undersigned for approximately 30 minutes on the first evening of the investigation. There was no further contact with Sergeant Gordon during the ongoing investigation other than being made aware of her participation therein.

3. The Court is acquainted with Manuel Martinez. This acquaintance was originally based on Mr. Martinez' appearance before this Court when the undersigned was a District Judge for the Second Judicial District of Colorado and Mr. Martinez was assigned to the Office of the Public Defender in that district. Subsequently, Mr. Martinez was appointed Manager of Safety and the undersigned had several passing conversations with him in the course of hearing cases involving the City and County of Denver and in the halls of the City and County Building.

4. The Court does not recall ever meeting Captain Tina Rowe. The Court's acquaintance with Captain Rowe is purely professional based on a knowledge of her qualifications as a police officer, which knowledge was obtained in discussions totally unrelated to this case or any other pending case.

The Court has had no personal or social contact with any of the above individuals at any time other than personal letters

addressed to Chief Michaud on the occasion of his appointment to Chief of Police and in thanks for the work of his department after the conclusion of the homicide investigation.

DISCUSSION

This matter is brought before the Court on an allegation by Plaintiff that this Judge should disqualify himself from hearing the case as his impartiality might reasonably be questioned pursuant to 28 U.S.C. §455(a). No allegations are made pursuant to 28 U.S.C. §455(b) or 28 U.S.C. §144.

Section 455(a) of Title 28 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The provisions of 28 U.S.C. §455(a) do not command automatic disqualification of a judge, to the contrary, it is the duty of the judge who is allegedly biased to pass on the sufficiency of the allegations. *Hall v. Burkett,* 391 F. Supp. 237 (W.D. Okla. 1975). A judge has an affirmative duty not to disqualify himself unnecessarily. The test is whether a reasonable person knowing all the relevant facts would harbor doubts about the judge's impartiality. *Glass v. Pfeffer*, 849 F.2d 1261, 1268, (10th Cir. 1988). While §455(a) is extremely broad, it must not be so construed that it becomes in effect presumptive so that the recusal is mandated upon a mere, unsubstantiated suggestion of personal bias or prejudice. *U.S. v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982).

The Court recognized the importance of the avoidance of any appearance of impropriety in developing and maintaining the public's confidence in the judiciary. Such an appearance in a case, even in the absence of an actual showing of the same, is as damaging as the actual impropriety or prejudice.

Courts have adopted a test to determine whether there is an appearance of impropriety. Besides creating an objective standard, the adoption of this test is also intended to assist Courts in resolving conflicting duties imposed upon judges for disqualification in appropriate cases versus "the duty to sit" in an appropriate case. *State of Idaho v. Freeman*, 507 F. Supp. 706 (D. Id. 1981).

In determining whether a judge must disqualify himself or herself from a case on the grounds that impartiality might reasonably be questioned, the Judge should take into consideration all of the circumstances both in the public view and those hidden and determine if a reasonable, uninvolved observer would consider that the judge's impartiality might reasonably be questioned. Where it appears, as here, that a judge has a wide range of discretion in rulings, grounds for disqualification should be strongly considered. *State of Idaho v. Freeman*, 507 F. Supp. 706.

The standard adopted by federal courts is sufficiently broad to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is present. *Smith v. Pepsico*, 434 F. Supp. 524, 525 (1977).

Under our system of justice, litigants come to the Courts expecting neutral resolution of their controversies by an impartial jurist and they are entitled to nothing less. Any appearance of impartiality which would give rise to a reasonable question as to that neutrality should be examined scrupulously by the trial judge. To do otherwise would bring into question the integrity of the [sic] our entire judicial system. It is imperative that this system exemplify a search for truth and justice and this can only be achieved through total fairness and impartiality.

In judging whether an appearance of impropriety exists, the Court has a duty to determine whether every semblance of reasonable doubt or suspicion that a hearing by a fair and impartial tribunal would be denied. Whether a judge should disqualify himself or herself based on actual prejudice or the appearance of prejudice or impropriety is a matter vested solely in the conscience of the trial judge considering not whether there exists factual impartiality but rather a reasonable person might question the Court's impartiality under all the circumstances. *U.S. v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979). It is proper, notwithstanding the lack of procedural guidelines, for the Court to pass upon this matter under the circumstances here present. *See* 13 A. Wright Miller, and Cooper, *Federal Practice and Procedure 2d*, §3550, at 625-629 (1984).

This Court has given careful consideration of all the allegations made, especially the general allegation that it would be difficult if not impossible for this Court to remain impartial in a case involving the Denver Police Department. Upon careful reflection, the Court concludes that its impartiality cannot be reasonably questioned considering the totality of the circumstances afore-referenced.

ORDER

For the reasons, stated, Plaintiff's Motion for Disqualification of Trial Judge is **DENIED**.

DATED at Denver, Colorado, this 24th day of November, 1993.

BY THE COURT:

DANIEL B. SPARR, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 90-S-62

DOROTHY MONICA DAVID,

Plaintiff,

v.

CITY AND COUNTY OF DENVER; ARISTE DES ZAVARAS, Chief of Police, City and County of Denver; MANUEL MARTINEZ, Manager of Safety, City and County of Denver; WILLIAM HONER; JAMES LEO; AND CLAYTON KELLY CARPENTER,

Defendants.

ORDER

THIS MATTER comes before the Court on the motion for summary judgment on qualified immunity filed by Defendant Honer, Leo, and Carpenter. The Court heard oral argument on this motion June 10, 1992, and makes the following Order.

Qualified Immunity

Qualified immunity is a recognized doctrine that avoids unnecessarily extending the scope of the traditional concept of absolute immunity. *Forrester v. White*, 484 U.S. 216, 224 (1988) (citations omitted). In *Harlow v. Fitzgerald*, 457 U.S.

800, 818 (1982), the Supreme Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (citation omitted). The relevant question for purposes of qualified immunity analysis is whether a reasonable (state actor) could have believed the search to be lawful, in light of clearly established law and the information possessed. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

At its theoretical core, the resolution of immunity questions requires a balance between the inevitable evils of two extremes. Where there is an allegation of abuse of an official office, individuals have a right to recover for vindication of their constitutional guarantees. Congress has recognized and enshrined such rights in 42 U.S.C. §1983. At the same time, however, the Supreme Court has noted that it cannot be seriously disputed that such claims frequently are groundless and this gives rise to substantial expenditures of resources not only by officials in positions similar to Defendants herein, but to society as a whole. The social costs include expenses of litigation, diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. There arises also a danger that the fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), citing *Gregoire v. Biddle*, 117 F.2d 579, 581 (2d Cir. 1949), *cert. denied* 339 U.S. 949 (1950).

In deference to these considerations, the Supreme Court has identified what has come to be known as qualified or good faith immunity as the best attainable accommodation of the

competing values. The basic assumption in qualified immunity is that it allows unsubstantiated lawsuits to be quickly determined and terminated without the necessity of protracted litigation involving discovery, pre-trial motions, and trial. The primary means of accomplishing this is through the use of summary judgment. Decisions of the Supreme Court have established that qualified immunity has both an objective and subjective aspect. The objective element involves a presumptive knowledge of an respect for basic unquestioned constitutional rights. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective element refers to "permissible intentions." Characteristically, the Court has distinguished the two elements by identifying the circumstances in which qualified immunity would not be available. The Supreme Court has held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of his official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . ." (emphasis in original.) *Harlow v. Fitzgerald*, 457 U.S. at 815, citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975). This test is generally known as the objective test.

In *Malley v. Briggs*, 475 U.S. 335, 345 (1986), the Supreme Court held that an officer is immune from liability for his actions in seeking a warrant unless "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. Once the defense of qualified immunity has been raised, the plaintiff must meet the burden of identifying both clearly established law that an officer is alleged to have violated and that the official violated the clearly established law." *Martin v. Board of County*

Comm'rs of Pueblo County, 909 F.2d 402, 405 (10th Cir. 1990).

In *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991), Judge Ebel wrote that when a government official raises the defense of qualified immunity in a motion for summary judgment, the plaintiff must produce facts "sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." Citing *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989). To be clearly established, the right must be sufficiently clear that a reasonable official claiming qualified immunity would understand that his actions violated that right. See *Anderson v. Creighton*, 483 U.S. at 640; *Sawyer v. County of Creek*, 908 F.2d 663, 666 (10th Cir. 1990). In determining whether the law involved was one clearly established, the court examines the law as it was at the time of defendant's actions. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988).

In *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988), the Tenth Circuit held when a government official raises the defense of qualified immunity, in a motion for summary judgment, the plaintiff must produce facts "sufficient to show that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred. It is the plaintiff's burden to convince the court that the law was clearly established." *Id.* citing *Lutz v. Weld County School District*, 784 F.2d 340, 342-43 (10th Cir. 1986). The plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant violated it. Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly

prohibited." *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1518 (10th Cir.) *cert. denied*, 112 S.Ct. 656 (1991), citing *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990).

Examination of Plaintiff's 42 U.S.C. §1983 Claim

Plaintiff's claim was characterized at the hearing as a right to free speech regarding Title VII matters. Plaintiff attempts to distinguish Title VII as the basis for her §1983 claim by arguing that Title VII creates the right to be free from harassment and discrimination, which she was entitled to exercise and of which Defendants were aware, but that the impermissible action taken by Defendants was actually a violation of her First Amendment rights, in retaliation for communication concerning harassment.

In *Starrett v. Wadley*, 876 F.2d 808, 813 (10th Cir. 1989) the Tenth Circuit held that "[i]t is true that a right created solely under Title VII cannot serve as the basis for an independent remedy under Section 1983, lest Congress' prescribed remedies under Title VII be undermined." Citing *Long v. Laramie County Community College Dist.*, 840 F.2d 743, 752 (10th Cir.) *cert. denied*, 488 U.S. 825 (1988); *Tafoya v. Adams*, 816 F.2d 555, 558 (10th Cir.) *cert. denied*, 484 U.S. 851 (1987). The requirement that a plaintiff have an independent basis for claims outside Title VII was reiterated in *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991). Accordingly, a plaintiff may base a §1983 claim on actions proscribed by Title VII where those actions also violate the United States Constitution. *Polson v. Davis*, 895 F.2d 705, 710 (10th Cir. 1990). The Court will now turn its attention to the Plaintiff's asserted First Amendment violation.

Public employees may not be retaliated against for "speech on a mater of public concern." *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1437 (10th Cir. 1990), quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983). Courts employ a three-part analysis in evaluating a public employee's claim that an adverse employment decision violates First Amendment rights. *Saye v. St. Vrain Valley School Dist. RE- 1J*, 785 F.2d 862, 865 (10th Cir. 1986).

The first prong of the test involves a determination of whether a public employee's speech touches upon a matter of public concern. *Connick*, 461 U.S. at 142. Speech on matters of public concern has been defined as speech "fairly considered as relating to any matter of political, social, or other concern to the community." *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir. 1989). Justice White wrote in *Connick* that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147. To make this determination, a court must consider the content, form, and context of the speech. *Considine v. Board of County Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990); *Morfin*, 906 F.2d at 1437; *Wulf*, 883 F.2d at 857.

Plaintiff seems to argue here that the mere fact that she was communicating matters concerning her own situation does not remove such communication from the realm of community concern. However, this assertion effectively ignores the explicit rejection of this kind of argument (461 U.S. at 143) and the first prong of the *Connick* test. The fact that Plaintiff's complaints to her supervisors concerned an area

which has received substantial media attention (sexual discrimination and sexual harassment) does not vault her complaints into the arena of public concern.

The second prong of the test is considered if the statement satisfies the public concern inquiry. As the Court must conclude that the Plaintiff has not satisfied the first prong of the *Connick* test, the analysis stops here. The Court therefore rejects Plaintiff's argument that because she was speaking concerning matters covered in Title VII, her §1983 claim is properly founded. This ignores the requirement that Title VII not form the basis of a §1983 claim and that any asserted First Amendment right must here be based on a matter of public concern.

For these reasons, the Court must GRANT Defendants' motion for summary judgment on qualified immunity grounds. To the extent that there is a §1983 claim against Defendants Martinez and Zavaras, the motion made by these Defendants at the hearing and filed as of June 19, 1992, is also GRANTED. The Title VII claim is the only remaining claim in the complaint.

DATED at Denver, Colorado this 29th day of June, 1992.

BY THE COURT:

Daniel B. Sparr
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-1263

DOROTHY MONICA DAVID,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; JAMES COLLIER, Chief of Police, City and County of Denver; BETH MCCANN, Manager of Safety, City and County of Denver; STANLEY BANISZEWSKI; JOHN R. JOHNSON; WILLIAM HONER; JAMES LEO; CLAYTON KELLY CARPENTER,

Defendants-Appellees.

ORDER
Filed March 31, 1997

Before **SEYMOUR, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO,** and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court

PATRICK FISHER,
Clerk of the Court

by:
Deputy Clerk